

BBMB KEWANGAN BHD*a***v.****TAN SWEE HENG & ANOR**

HIGH COURT MALAYA, TEMERLOH

b

RAMLY ALI J

[CIVIL APPEAL NO: 11-25-2001]

14 JUNE 2002

CONTRACT: *Hire-purchase - Agreement - Construction - Vehicle seized by Customs Authorities for offence under Customs Act 1967 - Whether owner in breach of statutory conditions and warranties - Whether there was total failure of consideration - Whether contract void for impossibility - Instalments paid by hirer - Whether to be refunded - Hire-Purchase Act 1967, ss. 2(1), 4(1)(b)(i), (ii), 7(1), (4) - Contracts Act 1950, ss. 57(2), 66 - Road Transport Act 1987, s. 2*

*c**d*

On 17 May 1996 the first respondent ('the hirer') entered into a hire-purchase agreement with the appellant for the purchase of a certain vehicle. About a year into the agreement, on 23 July 1997, the vehicle was seized by the Customs and Excise Department for an offence under the Customs Act 1967, and following that, the hirer stopped paying the instalments for the vehicle. The appellant contended that the hirer was liable to continue to pay the instalments notwithstanding the seizure, and in the circumstances claimed for payment of RM17,776.90, being the balance unpaid sum under the agreement. The hirer, however, counterclaimed for the refund of the instalments already paid, arguing that there was a total failure of consideration for the agreement and that the appellant, by reason of the seizure, was in breach of the conditions and warranties under s. 7(1) of the Hire-Purchase Act 1967 ('the Act'). The claim and counterclaim apart, the appellant also sued the second respondent, the dealer for the vehicle, for false misrepresentation. The learned magistrate, having heard the evidence, dismissed the appellant's claim and allowed the hirer's counterclaim. This was the appellant's appeal against the said decision.

*e**f**g***Held:**

- [1] The hire-purchase agreement herein elicited two separate transactions, namely: (i) a sale of goods transaction between the second respondent and the appellant whereby the former 'sold' the vehicle to the appellant; and (ii) a hire-purchase transaction between the appellant as owner and the first respondent as hirer. (p 386 b-c)

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- a* [2] The appellant had held out as the owner of the vehicle when it executed the hire-purchase agreement. The appellant had also carried out the necessary inspection on the vehicle, and had satisfied itself as to the condition and status of the vehicle before entering into the agreement with the hirer. This being the case, the conditions and warranties under
- b* s. 7(1) of the Act must apply. The conditions and warranties, further, must form part and parcel of the agreement so as to protect the hirer. (p 388 a-c)
- c* [3] The appellant was in breach of all the three conditions and warranties under s. 7(1) of the Act. The breach goes to the root of the agreement, so that, upon such breach, liability on the part of the hirer under the agreement comes to an end. (p 390 b-d)
- d* [3a] Following the seizure of the vehicle, the appellant, as owner, could no longer fulfill any of the conditions and warranties under s. 7(1) of the Act. There was thus a complete failure of consideration for the agreement such as to warrant the application of ss. 57(2) and 66 respectively of the Contracts Act 1950. When there was a total failure of consideration, and when the hirer did not get what he had bargained for, the agreement must become void. Hence, the hirer was entitled to recover whatever money he had paid under the agreement.
- e* (pp 388 d & 391 b)
- f* [4] The definition of the word 'owner' under s. 2 of the Road Transport Act 1987 is not applicable. For the purpose of the present case, the word 'owner' must relate to the definition as employed by s. 2(1) of the Hire-Purchase Act 1967. In any case, even though the hirer was the registered owner of the vehicle, he was in law only a person who had possession and use of the car. This fact does not make him the legal owner of the vehicle. (p 392 d-f)
- g* [5] The letter of undertaking in the agreement was worded in such a way that it excluded the provisions of law implied under the Act. The document goes against the provisions of the Act meant for the protection of hirers. The document contravenes s. 34(a), (b) and (g) of the Act and is void for that reason. The learned magistrate was therefore right in disregarding the letter of undertaking. (p 396 h)
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- i* [6] The transaction between the appellant and the second respondent is one of sale of goods transaction, namely an outright sale of vehicle. The appellant having inspected the vehicle and satisfied itself as to its

condition and status, the doctrine of *caveat emptor* operates against them. In any case, there is no evidence that the appellant's decision to enter into the agreement was induced by false representation on the part of the second respondent. (p 397 a-d)

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[Appeal dismissed.]

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Case(s) referred to:

Butterworth Used Car Sdn Bhd v. Mayban Finance [1991] 3 CLJ 1721; [1991] 1 CLJ (Rep) 520 (**refd**)
Credit Corp (M) Bhd v. The Malaysia Industrial Finance Corp & Anor [1976] 1 MLJ 83 (**foli**)
Goh Yew Chew & Anor v. Soh Kian Tee [1970] 1 MLJ 138 (**refd**)
Karflex Ltd v. Poole [1933] 2 KB 251 (**foli**)
Low Ping Ming v. MBf Finance Bhd [2000] 2 CLJ 307 (**refd**)
Public Finance Bhd v. Ehwan Saring [1996] 1 CLJ 628 (**foli**)

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Legislation referred to:

Contracts Act 1950, ss. 57(2), 66
Hire-Purchase Act 1967, ss. 2(1), 4(1)(b)(i), (ii), 4A, 4B, 4C(2), (3), 7(1)(a), (4), 14, 15, 34(a), (b), (g)
Road Transport Act 1987, s. 2

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Other source(s) referred to:

Treitel, *The Law of Contracts*, 7th edn, p 37

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For the appellant - Wan Noor Suzana Wan Sulaiman; M/s Bahari, Choy & Nongchik
For the 1st respondent - Azwani Abdul Jalil; M/s Radzi & Abdullah
For the 2nd respondent - Richard Bong; M/s Bong & Co

Reported by WA Sharif

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JUDGMENT

Ramly Ali J:

This an appeal against the decision of the magistrate court, Temerloh dated 27 February 2001 wherein the learned magistrate dismissed the appellant's (plaintiff) claim against both the respondents (defendants) with costs and allowed the 1st defendant's counter claim against the appellant with costs, in respect of breach of condition and warranties arising out of a hire-purchase agreement with regard to the purchase of a motor vehicle, Mitsubishi No: BCH 718, dated 17 May 1996, entered into between the appellant (as owner) and the 1st respondent (as hirer).

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Facts Of The Case

The 1st respondent approached the 2nd respondent, who, at the material times was a dealer in motor vehicle business, for the purchase of a motor vehicle:

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- a* Mitsubishi bearing registration number BCH 718 (the said vehicle). On 17 May 1996, the 1st respondent entered into a hire-purchase agreement with the appellant for the purchase of the said vehicle, wherein the 1st respondent paid a sum of RM9,000 as deposit and the balance price of RM22,440 to be paid by monthly instalment of RM468 for 47 months and the last instalment of RM444. In the said agreement, the 1st respondent was described as “a hirer” while the appellant was described as “an owner”, in respect of the said vehicle.

- c* On 23 July 1997 the said vehicle was seized by the customs and excise department for an alleged offence under the Customs Act 1967, relating customs duty, after the 1st respondent has duly paid 12 monthly instalments without fail. Subsequent to the seizure of the said vehicle, the 1st respondent stopped payment of the instalment. The appellant filed a claim against both the respondents at the magistrate court, Temerloh, for a sum of RM17,776.90 being balance unpaid under the said hire-purchase agreement together with interest at 8% p.a. The 1st respondent filed a counterclaim against the appellant for a sum of RM14,616 for the deposit as well as 12 instalments payments which he has paid in respect of the said vehicle before it was seized by the customs department. The learned magistrate, after hearing all the witnesses called by both sides and submissions by all parties concerned, dismissed the appellant claims against both the respondents with costs and allowed the 1st respondent’s counterclaim against the appellant with costs.

Basis Of The Claim And Counter-Claim

- f* In its claim against the 1st respondent, the appellant alleged the 1st respondent has failed to fulfil his obligations in making monthly instalments as stipulated by the said hire-purchase agreement, leaving a balance of RM17,776.90 remained unpaid as at 9 January 1999. As against the 2nd respondent, who was a dealer in respect of the said vehicle, the appellant alleged that the said hire-purchase agreement was entered into on the strength of inducement made by the 2nd respondent who was in actual possession of the said vehicle before being sold to the 1st respondent. The appellant further alleged that the 2nd respondent has made false representation that the said vehicle was free from any encumbrance, while in actual fact, it was not. Therefore the plaintiff claimed that the 2nd respondent should also be held liable for the amount remained unpaid by the 1st respondent under the said hire-purchase agreement.
- g*
- h* In his counterclaim against the appellant, the 1st respondent claimed that by reason of the seizure by the customs department, the appellant has breached s. 7(1) of the Hire-Purchase Act 1967 which reads:

- i* (1) In every hire-purchase agreement there shall be:

- (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods; **a**
- (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass. **b**

The 1st respondent claimed that there was a total failure of consideration and therefore claimed that he is entitled to all the payments (deposits and instalments) which have been made in respect of the said vehicle under the said hire-purchase agreements together with interest at 8% p.a. and costs. In their defence to the counterclaim, the appellant relied on a letter of undertaking dated 17 May 1996 signed by the 1st respondent in favour of the appellant, to indemnify the appellant against all actions, claims, proceedings, loss damages and costs, by any party claiming ownership and lien over the said vehicle, even if such loss or damage is caused by a *bona fide* purchase by the 1st respondent. **c**

The learned magistrate ruled that there are two separate transactions in this case. The first transaction is between the appellant and the 2nd respondent, and the second transaction is between the appellant and the 1st respondent. The learned magistrate concluded that the first transaction (between the appellant and the 2nd respondent) is a contract for sale of goods where the ownership of the said vehicle was transferred to the appellant when the contract was entered into. The learned magistrate also ruled that there was no evidence of any inducement or false representation on part of the 2nd respondent as alleged by the appellant which led the appellant to enter into the said hire-purchase agreement with the 1st respondent. Therefore, according to the learned magistrate, the principle of “*caveat emptor*” is applicable. **d**

As for the second transaction (between the appellant and the 1st respondent) the learned magistrate ruled that it is a sale and purchase transaction involving a sale and purchase agreement under the Hire-Purchase Act 1967, where the appellant is the “owner” and the 1st respondent is the “hirer”. It was also ruled that when the said vehicle was seized by the customs department, the appellant, as the “owner” has committed a breach of s. 7(1)(a) of the Hire-Purchase Act 1967. **e**

Arguments By The Appellant

The appellant seems to agree that there are two separate transactions involved in the present case. However the appellant stressed that the first transaction, involving a sale of goods where the principle of “*caveat emptor*” applies, is **f**

- a* between the 1st respondent and the 2nd respondent, not between the appellant and the 2nd respondent as ruled by the learned magistrate. The second transaction, which is a hire-purchase transaction under the Hire-Purchase Act 1967, to the appellant, is between the appellant and the 1st respondent, ie, an agreement between the appellant and the 1st respondent to enable the 1st respondent to purchase the said vehicle from the 2nd respondent. That being the case, the appellant contended that the principle of “*caveat emptor*” applies on the 1st respondent when he purchased the said vehicle from the 2nd respondent. The appellant further submitted that if at all there was a breach of warranty for quiet possession, the said breach was committed by the 2nd respondent (as seller) against the 1st respondent (as buyer). It has nothing to do with the appellant. The appellant contended that the ownership title to the said vehicle transferred to the 1st respondent from the 2nd respondent the moment the 1st respondent paid RM9000 as deposit for the said vehicle to the 2nd respondent. The appellant claimed that the ownership title of the said vehicle was at all times with the 1st respondent when the said sale and purchase agreement was entered into and since the ownership title was with the 1st respondent, the appellant argued that the appellant, just a mere financier, cannot be said to have breached s. 7(1) of the Hire-Purchase Act 1967 when the said vehicle was seized by the customs department. The appellant seems to rely on the registration card for the said vehicle where the name of the 1st respondent was recorded as the registered owner. The appellant also seems to rely on the definition of the word “owner” under the Road Transport Act 1987 which indicates that the owner of the vehicle in question refers to the one whose name appears in the registration card. Therefore the appellant argued that the 1st respondent is liable to pay the appellant as claimed on the strength of the said hire-purchase agreement and that the appellant is not liable to the counterclaim made by the 1st respondent.

Arguments By The 1st Respondent

- g* The 1st respondent on the other hand insisted that the appellant was, at all material times when the said hire-purchase agreement was entered into, the owner of the said vehicle and the 1st respondent was on the hirer. Therefore when the said vehicle was seized by the custom department on 23 July 1997, when the said hire-purchase agreement was still in force, the 1st respondent argued the appellant has committed a breach of the warranties provided under s. 7(1) of the Hire-Purchase Act 1967. On that ground, the 1st respondent claimed that there was a total failure of consideration for the hire-purchase agreement and accordingly claimed for the return of the monies he had paid for the deposit as well as the monthly instalments for the said vehicles.

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Arguments By The 2nd Respondent

The appellant's claim against the 2nd respondent based on the allegations that the 2nd respondent, being a dealer in second-hand vehicles, has induced or persuaded the appellant to enter into the said sale and purchase agreement between the appellant and the 1st respondent and that the 2nd respondent has given false representation to the appellant to the effect that the said vehicle was free from any encumbrance, while in actual fact, it was not, when the said vehicle was seized by the customs department.

In his defence, the 2nd respondent contended that the act of the appellant entering into the said sale and purchase agreement with the 1st respondent was not because of any inducement or persuasion by the 2nd respondent, but was based on free trade and free market practices whereby the appellant has done its own inspection and investigation on the status and conditions of the said vehicle before deciding to enter into the said agreement. Therefore in denying the appellant's claim, the 2nd respondent argued that, being a transaction of 'sale of goods' (as between the appellant and the 2nd respondent), the principle of 'caveat emptor' applies as against the appellant.

Transactions Between The Parties

The 1st respondent approached the 2nd respondent for the purpose of buying the said vehicle BCH 718 on hire-purchase. He paid a sum of RM9000 as deposit. It is not disputed by all the parties that the 2nd respondent was at all material times, a "dealer" in second-hand vehicle. Under s. 2(1) of the Hire-Purchase Act 1967, a "dealer" means a person, not being the hirer or the owner or a servant of the owner, by whom or on whose behalf negotiations leading to the making of a hire-purchase agreement with the owner were carried out or by whom or on whose behalf the transaction leading to a hire-purchase agreement with the owner was arranged. The 2nd respondent then issued a statement duly completed and signed by him in accordance with the form set out on Part I of the Second Schedule of the Hire-Purchase Act 1967, as required under s. 4(1)(b)(i), and subsequently, before the signing of the said hire-purchase agreement, issued another statement to the 1st respondent and the appellant as prospective owner with the form set out in Part II of the second schedule as required under s. 4(1)(b)(ii).

The Part I form was issued to the 1st respondent (as the intending hirer) on 2 May 1996 to outline a short description of the said vehicle comprised in the hire purchase agreement and a summary of the 1st respondent's financial obligations under the proposed hire-purchase agreement. It was stated in the said form that the cash price of the vehicle – RM26,000; deposit paid – RM9,000; cash price less deposit – RM17,000; term charges – RM5,140; balance originally payable under the hire-purchase agreement – RM22,440;

- a* balance originally payable under the agreement inclusive of deposit – RM31,440; duration of payment of instalments in number of years – four years; number of instalments – 48 months and amount of each instalment – RM468 for 47 months and RM444 for one month.
- b* The Part II form was issued by the 2nd respondent (as a dealer) to the appellant, informing the appellant that the 1st respondent intends to enter into a hire-purchase agreement in respect of the said vehicle and inviting the appellant to be a party as “owner” in the proposed hire-purchase agreement. At the bottom of the said Part II form, the appellant confirmed that it agreed to be a party as “owner” in the proposed hire-purchase agreement. The said
- c* form as well as the confirmation was also sent to the 1st respondent. The transaction proceeded and on 16 May 1996 (one day before the said hire-purchase agreement was duly signed) the 2nd respondent issued a vehicle invoice to the appellant claiming for the price of the said vehicle as follows:
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- | | |
|---------------------------|------------|
| Total Price on the road | - RM26,000 |
| Less : Down Payment | - RM9,000 |
| Finance Loan : Payable by | |
| 48 months, Rate: 8% p.a. | - RM17,000 |
- e* The invoice gave detail description of the vehicle involved and it was stated at the top part of the invoice particulars: “Sold To: BBMB Kewangan Berhad”. The said amount was paid by the appellant to the 2nd respondent *vide* BBMB cheque No: 165113 as evidenced in the credit voucher dated 17 May 1996. Accordingly a hire-purchase agreement was duly signed by the appellant as
- f* “owner” and the 1st respondent as “hirer” of the said vehicle. The word “owner” as defined under s. 2(1) of the Hire-Purchase Act 1967 means “a person who let or has let goods to a hirer under a hire-purchase agreement and includes a person to whom the owner’s right or liabilities under the agreement have passed by assignment or by operation of law.” The word
- g* “hirer” on the other hand, is defined as “the person who takes or has taken goods from an owner under a hire-purchase agreement and includes a person to whom the hirer’s rights or liabilities under the agreement have passed by assignment or by operation of law.” The particulars relating to table of payments and particulars relating to payments under Part III and IV of the
- h* Schedule to the said hire-purchase agreement are reproduced below:
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PART III
TABLE OF PAYMENTS

(i) Cash Price of Goods	:	\$26,000.00	<i>a</i>
(ii) Deposit	:	\$ 9,000.00	
Cash (\$)	:		<i>b</i>
other than Cash (\$)	:		
Cash Price less Deposit		\$17,000.00	\$17,000.00
(iii) Freight		\$	<i>c</i>
(iv) Vehicle Registration Fees		\$	
(v) Insurance for motor vehicle for first 12 months		\$	
OR			<i>d</i>
Insurance for Goods other than motor vehicles, for duration of Agreement		\$	
(vi) Total of Items (i),(iii),(iv) and (v) less Deposit		\$17,000.00	
(vii) Terms Charges: Total Amount at 8.00 %		\$ 5,440.00 per annum	<i>e</i>
(viii) BALANCE ORIGINALLY PAYABLE UNDER THIS AGREEMENT (Total of Items (vi) and (vii))		\$22,440.00	
(ix) Annual Percentage Rate of Term Charges 14.35 %			<i>f</i>
(x) HIRE PURCHASE PRICE (Total of Item: (viii) and Deposit)		\$31,440.00	
(xi) Difference between Item (i) and Item (x)		\$ 5,440.00	

PART IV
PARTICULARS RELATING TO PAYMENTS

(i) Date on which the hiring shall be deemed to have commenced:	17/5/1996	<i>g</i>
(ii) Duration of payment of instalments in number of months or years:	48 months	
(iii) Number of instalments:	48	<i>h</i>
(iv) Amount of each instalment and one final instalment of: RM468.00 and (if applicable) one final instalment of RM444.00		<i>i</i>

- a* (v) Instalments commencing on 17/06/1996 and thereafter on or before the 17th day of each succeeding month.

From the detail description of the transaction involved between the parties, particularly based on the relevant documentations, I have no hesitation to hold that there are two separate transactions involved in the present case. The first transaction is a sale of goods transaction between the 2nd respondent and the appellant whereby the said vehicle was “sold to” the appellant by the 2nd respondent and the payment for the sale price of the vehicle was paid *vide* BBMB cheque no: 165113 as evidenced in the credit voucher dated 17 May 1996 issued by the appellant. The second transaction is purely a hire-purchase transaction as evidenced by the said hire-purchase agreement dated 17 May 1996 between the appellant (as owner) and the 1st respondent (as hirer). This second transaction is governed by the Hire-Purchase Act 1967 and therefore all the relevant provisions under the said Act, particularly relating to implied warranties under s. 7(1), are applicable.

d **Hire-Purchase Transaction Between The Appellant And The 1st Respondent**

A hire-purchase agreement under the Hire-Purchase Act 1967, is regarded as a form of contract whereby the owner lets goods out on hire and agrees that the hirer may either return the goods and terminate the contract or elect to buy the goods on the completion of the required periodic payment. (see: *e* ss. 14 and 15 of the Act). Clause 14 of the said hire-purchase agreement in the present case clearly provides:

- f* 14. This Agreement shall not be now be construed to be a purchase or an agreement for the purchase of the Goods by the Hirer but if the Hirer shall duly perform and observe all the stipulations and conditions in this Agreement on his part to be performed and observed and shall in the manner set out in this Agreement pay to the Owner all sums of money payable to the Owner by the Hirer hereunder, the Hirer shall have an option of purchasing the Goods and upon exercising such option of purchasing the Goods the hiring shall come to an end and the Goods shall become the property of the Hirer and the Owner shall will assign and make over all the Owner’s right benefit and interest in the Goods to the Hirer but until such payments as aforesaid have been made and the said stipulations and conditions have been performed and the option have been exercised the Goods shall remain the absolute property of the Owner and the Hirer shall not have any right or interest in the Goods other than that of a bailee.
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It is to be noted that “the owner” as described in the preamble to the said hire-purchase agreement refers to the appellant while “the hirer” refers to the 1st respondent. There is no indication at all, in the present case, to show that the 1st respondent (as the hirer) has exercised the said option to purchase the

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said vehicle (under cl. 14) before the said vehicle was seized by the customs department. Therefore, the ownership or the property in the said vehicle still remained with the appellant. To support this finding, I would like to cite the decision of Abdul Hamid J in *Credit Corp (M) Bhd v. The Malaysia Industrial Finance Corp & Anor* [1976] 1 MLJ 83 where he said:

Upon the true construction of the Plaintiff's agreement which was of a type to which the Hire-Purchase Act applied, until the hirer had exercised his option to purchase the car by paying the total rentals and fulfilling all his obligations under the agreement, no property in the car passed to the hirer.

In the case of *Low Ping Ming v. MBf Finance Bhd* [2000] 2 CLJ 307, Steve Shim J (as he then was) has said:

A common characteristic or feature of such an agreement is that the hirer has the option of purchasing the goods. And through out the period of hire-purchase, title to the goods remain with the owner. Therefore, unlike a sale of goods, no title to the goods passes from the owner to the hirer during the period of hire. It is common practice nowadays for a finance company to be involved in a hire purchase transaction as owner. For example, the finance company buys the goods from the dealer who is paid the price and the finance company then steps into the dealer's shoes and becomes the owner for the purpose of the hire-purchase agreement. In this way, the finance company becomes the owner as well financier.

The Hire-Purchase Act 1967 specifies the relevant requirements relating to a hire-purchase agreement. The contents of the hire-purchase agreement must strictly comply with the relevant provisions of the Act particularly s. 4A, 4B and 4C of the Act. Section 4C(2) provides that a hire-purchase agreement that contravenes the requirements as to the contents under sub-s. 4(1) shall be void. Section 4C(3) further provides that an owner who enters into a hire-purchase agreement in contravention of sub-s. (1) shall, notwithstanding that the hire-purchase agreement is void, be guilty of an offence under the Act, s. 7(1) of the Hire-Purchase Act 1967 clearly stipulates that in every hire-purchase agreement there shall be:

- (a) an implied warranty that the hirer shall have and enjoy quiet possession of the goods;
- (b) an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass;
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party at the time when the property is to pass.

- a* In the present case, the conduct of the parties as well as the documentation involved clearly show that the appellant had held itself out as the owner of the said vehicle when the hire-purchase agreement was entered into on 17 May 1996. The appellant has done the necessary inspections and investigations to determine the condition as well as the status of the said vehicle. The appellant
- b* has satisfied that the said vehicle was in good condition and without any problem and later decided to buy the vehicle from the 2nd respondent and subsequently entered into a hire-purchase agreement with the 1st respondent. Therefore all the conditions and warranties provided under s. 7(1) of the Act shall apply and by law, shall form part of the agreement for the protection of
- c* the 1st respondent as hirer. However, as the said vehicle was seized by the customs department on 23 July 1997, after the said hire-purchase agreement was signed and executed and had not been returned to either party since (as the investigation by the customs department was still pending at the date of the hearing at the magistrate court, it is obvious that the appellant as owner, could not fulfil any of the conditions and warranties stipulated under s. 7(1)
- d* of the Act.

- The 1st respondent could not have and enjoy quiet possession of the said vehicle, he could not have the right to purchase the vehicle at the time when the property is to pass, and the said vehicle was not free from encumbrance
- e* in favour of any third party (including the relevant authority) at the time when the property is to pass. As contended by the 1st respondent, there is a complete failure of consideration for the said hire-purchase agreement.

In *Karflex Ltd v. Poole* [1933] 2 KB 251; [1933] All ER Rep 40, Acton J has held that:

- f* The agreement through out seems to me to be designed to express that the plaintiff hold themselves out to be and are in fact the owners of the vehicle, and, in my view, it is impossible to resist the conclusion that, according to the true intention of the parties, the whole agreement was conditional upon the Plaintiffs being the owners of the vehicle.

- g* Goddard J in the same case, at p. 50 said:

- I think myself that the judgment, both as to the claim and the counter-claim can, in the particular circumstances, of this case be supported as a matter of mere construction of the agreement. That of course, is not a point of several
- h* application, but in this agreement the Plaintiffs described through out as the owners of the car ... and they undertake in the agreement an obligation to pass the property in the car to the hirer at any moment after signing of the agreement when he choose to pay the full amount of the purchase price, whether by means of instalments or by a lump sum, which he has an option
- i* of doing. In those circumstances, it seems to me that there is an express

condition in this contract that the plaintiffs are the owner of the car. It is not a matter of warranty, it is a matter of condition it must be, in my judgment, a condition that they are the owners of the car which they purport to deal with in this manners by hire-purchase.

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In that case (*Karflex Ltd*), the plaintiffs purchased a motor car from a man named King, who held himself out to be the owner of the car. Subsequently, by a hire-purchase agreement the plaintiffs, who described themselves as the owners of a motor car, agreed to hire it to the defendant on the terms that in consideration of an initial payment of Pound Sterling 95 the defendant has the option to purchase it at any time during the currency of the agreement on making certain agreed payments. On the hirer falling into arrears with his monthly payments, the plaintiffs re-took possession of the motor car and commenced an action to recover compensation. The defendant counterclaimed for repayment of the initial payment which he had paid to the plaintiffs on entering into the agreement as he could ascertain that at the date of the agreement the plaintiffs were not in fact the owners, the motor car having been sold to them by a person who had no title to it. The trial court dismissed the plaintiffs claim and gave judgment for the defendant on the counterclaim and the plaintiffs appealed. The appeal was dismissed.

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The above principle was based on the common law position. In our present case, eventhough we have express provisions relating to the same implied conditions and warranties under s. 7(1) of the Hire-Purchase Act 1967, the common law position, as far as it relates to the same issues, is still applicable. Section 7(4) of the Act has preserved the common law position relating to all the implied conditions and warranties provided under s. 7(1). Section 7(4) provides:

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- (4) Nothing in this section shall prejudice the operation of any other written law or rule of law whereby any condition or warranty is to be implied in any hire-purchase agreement.

In the case of *Public Finance Bhd v. Ehwan Saring* [1996] 1 CLJ 628, Mohd Ghazali J has said:

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In the instant case, it would seem that the vehicle is now deemed to be forfeited by the customs pursuant to section 128(1) of the Custom Act. That being so, I am of the view that in accordance with section 57(2) of the Contracts Act, the agreement has become void as it would now be impossible for the appellants to assign and make over all its right, benefit and interest in the vehicle as they now have a defective title. When the appellants entered into the agreement, it stood in the shoes of Tan; they have received an advantage under the agreement, namely, the RM57,000 which the Respondent has paid towards the purchase of the vehicle. Accordingly, since the agreement is now void as it would now be impossible for the appellants to pass a good title over

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- a* the vehicle, I am of the view that they are bound, in accordance with section 66 of the Contracts Act, to return the RM57,000 which they have received from the Respondent. I would think that upon these grounds alone that the Respondent would be entitled to his claim.

- b* Applying the same principle to the present case, I am of the view that the appellant, being an owner to the said hire-purchase agreement has committed a breach of all the three conditions and warranties stipulated under s. 7(1) of the Hire-Purchase Act 1967. As the said vehicle has been seized by the customs department, it is now impossible for the appellant to fulfil any of the three conditions and warranties in favour of the 1st respondent. The said vehicle was seized by the customs department on 23 July 1997. As at 27 June 2000 (almost three years later) when PW1 (customs superintendent) gave evidence in the magistrate court, Temerloh, the said vehicle was still being held by the customs department as investigation still not completed. It is a breach that goes to the root of the agreement so that upon such a breach, liability on the part of the 1st respondent under the agreement comes to an end.

Following the principle in *Karflex Ltd v. Poole (supra)*, Mohd Ghazali J in *Public Finance Bhd v. Ehwan Sarina (supra)* ruled:

- e* In the instant case, the appellants, who claims and represented that they are the owner of the vehicle when they entered into the said agreement with the respondent, has later discovered that their title was defective. That, to me, is a breach of condition which goes to the root of the agreement so that upon such a breach, liability on the part of the respondent under the agreement comes to an end, and consequently he would be entitled to recover the amount paid by him to purchase the vehicle from the appellants who are now standing in Tan's (dealer) shoes from the date of the agreement.

I am in full agreement with his Lordship Mohd Ghazali J in that case. I am also of the view that s. 57(2) of the Contracts Act 1950 is applicable in favour of the 1st respondent. Section 57(2) of the said Act provides:

- g* (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
- h* The appropriate remedy for the 1st respondent in the present circumstances is provided under s. 66 of the Contracts Act 1950 which reads:
- When an agreement is discovered to be void, or when the contract becomes void, any person who has received any advantage under the agreement or
- i*

contract is bound to restore it or to make compensation for it, to the person from whom he received it.

a

When there was a total failure of consideration and that the respondent did not get what he bargained for, then the agreement shall be come void and the respondent must be allowed to recover whatever money paid under the agreement. In the case of *Goh Yew Chew & Anor v. Soh Kian Tee* [1970] 1 MLJ 138 at p. 141, Ali FJ said:

b

This principle or doctrine of failure was stated by Viscount Simon LC in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 in these words:

c

The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the Plaintiffs use

d

Again, it was stated by the learned author in Treitel in *The Law of Contracts* (7th edn) at p. 37 that:

e

A contracting party can recover back money paid under a contract if there is a 'total failure of consideration' i.e. if he has not got any part of what he bargained for.

On that grounds, it is my judgment that the appellant's claim against the 1st respondent is without merit and therefore to be dismissed with costs. It is also my judgment, that the 1st respondent's counter-claim against the appellant, be allowed with costs.

f

Other Issues Raised

g

I shall now deal with some of the issues raised by the appellant in the present appeal.

The appellant's main task is to convince the court that the ownership title of the said vehicle was, at all material times, with the 1st respondent after the said hire-purchase agreement was signed on 17 May 1996. The intention is that, if that fact can be established, then the appellant argued that the conditions and warranties stipulated in s. 7(1) of the Hire-Purchase Act 1967, which rely on the strength that the appellant was the owner of the said vehicle, can be negated and not applicable against the appellant. The appellant also argued that the 1st respondent has become the owner of the vehicle when he

*h**i*

- a* paid RM9000 deposit to the 2nd respondent. To support this contention, the appellant argued that the fact that the 1st respondent's name is registered in the registration card as the registered owner of the said vehicle, it shows that he was the owner of the said vehicle from the date of the registration. To support this contention the appellant cited the definition of the word "owner" under s. 2 of the Road Transport Act 1987 which provides:

"owner"

- (a) in relation to a motor vehicle registered or deemed to be registered under this Act, means the registered owner of such vehicle; and
- c* (b) in relation to any other motor vehicle, means the person in possession of or using or having the use of the motor vehicle.

- With respect I cannot agree with the above contentions of the appellant. The definition of the word "owner" under s. 2 of the Road Transport Act 1987 is confined only for the purpose of the said Act. While the definition under s. 2(1) of the Hire-Purchase Act 1967 is confined only for the purpose of the Hire-Purchase Act 1967. The present claim brought by the appellant against both the respondents is based on the said hire-purchase agreement dated 17 May 1996, and therefore comes under the purview of the Hire-Purchase Act 1967, not under the Road Transport Act 1987. Therefore, I can positively say that for the purpose of the present case before this court, the word "owner" must be based on the definition under s. 2(1) of the Hire-Purchase Act 1967, and not under the Road Transport Act 1987. This finding is in line with the decision by Abdul Hamid J in *Credit Corp* case (*supra*) when held:

- f* Eventhough the hirer was the registered owner of the car he was only in law the person who had possession and use of the car and this fact did not necessarily make him the legal owner of the car.

- The above ruling was followed by Abdul Hamid Hj Mohamad JC in *Butterworth Used Car Sdn Bhd v. Mayban Finance* [1991] 3 CLJ 1721; [1991] 1 CLJ (Rep) 520. The fact that the 1st respondent's name was registered as "the registered owner" in the registration card of the said vehicle did not make him the legal owner of the vehicle. There is an endorsement "hak milik dituntut oleh (ownership claimed by)" the appellant in the registration card. The contents of the said hire-purchase agreement as well as the relevant provisions of the Hire-Purchase Act 1967 must be given effect.

- It is not disputed by the parties, including the appellant, that he said agreement dated 17 May 1996 between the appellant and the 1st respondent which form the thrust of the appellant's claim against both the respondents, is a hire-purchase agreement; and therefore must be governed by the Hire-Purchase Act 1967. Section 2(1) of the Act defines "hire-purchase agreement" includes a

letting of goods with an option to purchase and an agreement for the purchase of goods by instalment (whether the agreement describes the instalments as a rent or hire or otherwise), but does not include any agreement – (a) whereby the property in the goods comprised therein passes at the time of the agreement or upon or at any time before delivery of the goods. Even in the hire-purchase agreement itself, it is clearly stated that the appellant is the “owner” while the 1st respondent is the “hirer”. In the appellant’s defence to the counterclaim (paras 3-4) the appellant strongly insisted that at all relevant times the appellant has the ownership to the said vehicle.

(3) Plaintiff menafikan sekeras-kerasnya perenggan 2 Tuntutan Balas Defendan Pertama, sebaliknya menegaskan bahawa **Plaintif mempunyai hak milik yang sah dan sempurna** keatas kenderaan tersebut sebagaimana yang turut diakui oleh Defendan Pertama di perenggan 3 Penyata Pembelaan.

(4) Plaintiff yakin dan percaya bahawa pada setiap masa yang material **pada masa perjanjian ditandatangani mereka mempunyai hak mutlak yang sah dan sempurna keatas kenderaan tersebut.**

In the pleadings, the appellant strongly insisted that they have absolute ownership on the said vehicle at all material times when the said hire-purchase agreement was signed. In other words, the appellant admitted that it was the “owner” of the said vehicle. But surprisingly, in their submission, in the present appeal, the appellant was trying hard to convince the court that they were not the owner of the said vehicle, but insisted that the owner was, at all relevant times, the 1st respondent. I think this line of submissions by the appellant is self-defeating. Either way, the position is still favourable to the 1st respondent. If the appellant is the owner of the said vehicle under the said hire-purchase agreement, then the appellant is caught under the warranties provisions under s. 7(1) of the Hire-Purchase Act 1967. If on the other hand, the appellant managed to convince the court that the appellant is not the owner of the said vehicle but insisted that it was the 1st respondent who was the owner under the said agreement, (as what was being submitted), then the said agreement which form the thrust of the appellant’s claim against both the respondents, is not a hire-purchase agreement, as defined under s. 2(1) of the Hire-Purchase Act 1967 as the property or ownership in the subject matter of the agreement has passed at the time of the agreement to the 1st respondent. That being the case, the said agreement, which failed to comply with the requirements of the Act shall be void and of no effect. Then the appellant’s claim must fail. In that sense, it seems that the appellant was fighting a losing battle.

The appellant also argued that the learned magistrate was wrong when he failed to consider that the deposit RM9,000 was actually paid by the 1st respondent to the 2nd respondent, not to the appellant. Therefore, the appellant argued

- a* that the learned magistrate was wrong in allowing the 1st respondents counterclaim against the appellant in respect of that said RM9000 deposit. Again, I am not able to agree with the appellant on this point. The conduct of the 2nd respondent at the beginning of the transaction between all the three parties showed that, he was a dealer, as defined under s. 2(1) of the Hire-Purchase Act 1967.
- b*

- c* Being a dealer, he was responsible for the negotiations that led to the making of the hire-purchase agreement with the owner or by whom the transaction leading to a hire-purchase agreement with the owner was arranged. In the circumstances whatever deposit paid by the 1st respondent as the intending hirer, must be taken to be part of the hire-purchase transaction under the Hire-Purchase Act 1967. The relevant documents, namely the said hire-purchase agreement particularly Part III and Part IV of the schedule, Part I and Part II forms under the second schedule to the same Act (as required under s. 4(1) of the Act) clearly support this finding. In all those documents, the amount
- d* RM9,000 as deposit was clearly provided for. Mathematical calculation on all the relevant payments in the table of payment, Part III of the schedule to the said hire-purchase agreement clearly shows that the said RM9,000 was included in the purchase price. The cash price of the said vehicle (item i) – RM26,000; Deposit paid (item ii) – RM9,000; Cash price less deposit (item ii)) –
- e* RM17,000; Hire purchase price (Total of items (viii) and deposit) RM31,440. Therefore, I am of the view even though the said sum of RM9,000 was paid as deposit to the 2nd respondent the said sum comprised payment in the said hire-purchase agreement, which ultimately was set-off in the total payment which the appellant has to pay to the 2nd respondent as the full purchase price of the said vehicle. That is why the appellant only issued, a cheque BBMB
- f* No: 165113 for an amount of RM17,170 to the 2nd respondent, being payment for the purchase of the said vehicle. (see: Credit Voucher dated 17 May 1996 as well as vehicle invoice dated 16 May 1996 issued by the 2nd respondent). Therefore, I am satisfied that the appellant's argument on this point is without merit and therefore to be disregarded.
- g*

- h* The appellant has also raised an issue relating to a letter of undertaking signed by the 1st respondent in favour of the appellant. The appellant argued that the learned magistrate was wrong when he failed to take into consideration about a letter of undertaking dated 17 May 1996 signed by the 1st respondent. The said letter of undertaking is reproduced below:

i

Name : TAN SWEE HENG

a

Address: 202/01, MERAK APARTMENT
JALAN BUKIT IDAMAN 8
TAMAN IDAMAN
BATU CAVES 68100
SELANGOR

b

Date: 17-05-1996

The Branch Manager
BBMB Kewangan Berhad

Dear Sir,

c

RE: LETTER OF UNDERTAKING

Make & Model : MITSUBISHI

Date of Regn. : 01-08-1985

Regn. No. : BCH 718

Chasis No. : E12A-03063

Engine No. : G63B-FU6556

d

1. I am a prospective purchaser of the above secondhand motor vehicle (hereinafter called "the said vehicle") and I am desirous to obtain hire purchase facilities from BBMB Kewangan Berhad to finance the purchase of the said vehicle.
2. I certify that I have inspected the title to the said vehicle and am satisfied that it is a good and valid title and that it is free from encumbrances, and the said vehicle is not subject to any lien of ownership claim by any other financial institution.
3. In consideration of BBMB Kewangan Berhad entering into a Hire Purchase Agreement with me, I hereby agree, covenant and undertake as follows:
 - a) to indemnify BBMB Kewangan Berhad and to keep indemnified against all actions, claims, proceedings, loss damages and costs against BBMB Kewangan Berhad by any financial institution or other third party claiming ownership and lien over the said vehicle even if such loss or damage is caused by a *bona fide* purchase on my part.
 - b) on demand made by writing, to pay BBMB Kewangan Berhad under the said hire purchase agreement as may be entered into in the event that the financial institution or other third party claims the said vehicle and notwithstanding that the defect in the title to the said vehicle was not apparent on the face of the documents or that the defect in the title to the said vehicle was caused by the act or omission, however, by a third party.

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NRIC: A1844609

^c which I reproduce below:

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CUHK

Claim Against The 2nd Respondent

With regard to the appellant's claim against the 2nd respondent, I agree with the learned magistrate finding that the transaction between the appellant and the 2nd respondent that preceded the hire-purchase transaction between the appellant and the 1st respondent, is one of a sale of goods transaction ie, it is an outright sale of the said vehicle from the 2nd respondent to the appellant who later, let the said vehicle on hire-purchase to the 1st respondent. The characteristic of the said sale is that an offer has been made by the 2nd respondent to the appellant; the appellant has done some inspection and investigation on the status and condition of the said vehicle; the appellant agreed to accept the offer for sale and made the necessary payment to the 2nd respondent. The property or ownership title of the said vehicle passed at the time when the sale was completed when the sale price was fully paid, just before the appellant entered into the said hire-purchase agreement with the 1st respondent in respect of the same subject matter. The doctrine of "*caveat emptor*" (let the buyer beware) is applicable against the appellant.

From the evidence adduced, it is clear that the appellant has done sufficient inspections and investigations on the said vehicle before the appellant agreed to be the owner and disbursed the hire-purchase loan. The evidence of SP3, who was the marketing and credit officer of the appellant's Mentakab branch at the material times clearly confirmed the findings. In his examination-in-chief SP3 said:

Pihak BBMB ada buat inspection terlebih dahulu ke atas kenderaan sebelum loan diluluskan. Saya dan Sazali bin Jalani ada buat pemeriksaan kenderaan di premis kenderaan Teck Loong Motor Enterprise.

Kita akan lihat nombor enjin dan bandingkan dengan geran. Lihat nombor chasis dan bandingkan dengan geran. Lihat nombor kenderaan dan bandingkan, Juga pemeriksaan fizikal atau luaran. Saya sendiri yang buat pengesahan. Sazali sama-sama soya buat pemeriksaan. Ini adalah biasa yang dibuat oleh BBMB (Kewangan).

Untuk nombor enjin dan chasis, kita buka bonet kenderaan hadapan dan nombor enjin terpahat pada enjin. Nombor chasis terdapat pada chasis hadapan kenderaan tersebut. Nombor enjin dan chasis boleh dilihat. Nombor enjin dan chasis sama seperti dalam geran.

Further in his cross-examination, SP3 said:

Saya buat pemeriksaan kenderaan pada 1996. Tujuan pemeriksaan dibuat untuk pastikan fizikal kenderaan baik, chasis, nombor enjin dan pendaftaran betul. Saya berhak untuk sahkan nombor enjin dan chasis adalah betul. Tujuan pengesahan dibuat sebagai salah satu syarat untuk pembiayaan kenderaan terpakai.

- a* la berdasarkan chasis dan enjin sahaja betul. Kalau nombor enjin tak sama dengan geran, soya akan minta surat pembelian enjin yang baru daripada penjual. Selepas itu baru saya buat pengesahan.
- Tujuan buat pemeriksaan fizikal untuk pastikan ada kesan perlanggaran atau tidak serta accessori lain dalam kenderaan. Saya mempunyai pengalaman 03
- b* tahun memeriksa kenderaan. Saya tak ingat berapa buah kenderaan saya telah periksa.
- Saya tak dapati ada kelainan dart segi body kenderaan itu. Saya tahu kenderaan yang dicantumkan body berlainan bercanggah dari segi undang-undang. Pemeriksaan enjin, chasis dan body ambil masa 1/2 jam. Pemeriksaan fizikal kenderaan diambil masa 10 minit sahaja.
- c*
- P-4 dirujuk.
- Ini prosedur biasa untuk kenderaan terpakai. Ia dibuat masa tandatangani agreement.
- d* Untuk kereta-kereta terpakai kita tak hantar ke JPJ untuk buat pemeriksaan. Saya telah buat semakan apa yang perlu. Kereta dapat dipindahmilik selepas itu, Tahun 1996 kenderaan ini tiada masalah. Masa diterima kereta ini bebas dari semua halangan.
- e* Apabila berurusan second hand car, lebih berjaga-jaga.
- SP2, who was the branch manager of the appellant's Mentakab branch, also confirmed SPS's evidence on the issue in question. During his examination-in-chief, SP2 said:
- f* Encik Mohd Zamri yang handle kes ini. Beliau marketing officer pada masa itu. Plaintiff ada buat check list pada kenderaan itu. Plaintiff ada pastikan bahawa kereta itu bebas dari segala halangan undang-undang. Plaintiff ada buat pemeriksaan terhadap kenderaan itu. Plaintiff ada buat siasatan dengan JPJ. Plaintiff ada buat pemeriksaan dengan FIS.
- g* Saya percaya kereta itu good title. Ini procedur yang biasa diikuti oleh pihak bank.
- h* From the above evidence, I am convinced that the appellant has agreed to enter into the hire-purchase agreement with the 1st respondent based on the findings of their investigations and inspections of the said vehicle, which was found to be satisfactory and disclosed no problem. There is no evidence at all to show that the appellant's decision was based on the alleged inducement or false representation made by the 2nd respondent. SP3 who was personally handling this transaction, did not mention anything about the alleged inducement and false representation by the 2nd respondent. In fact SP2, in
- i* his cross-examination, confirmed that the hire-purchase loan is determined by

the loan committee, comprising of three persons and the marketing officer (SP3) and his officers will carry out inspection and investigation on the said vehicle before the loan is approved and disbursed. Therefore, the appellant's allegation about the inducement and false representation by the 2nd respondent, is not true and not supported by any evidence. Therefore the learned magistrate was correct when he dismissed the appellant's claim against the 2nd respondent with costs.

Conclusion

Based on the above consideration and after hearing submissions by all the counsels of the appellant and both the respondents, I am satisfied that the learned magistrate was correct in his decision. Therefore, the present appeal is dismissed with costs.

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